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No. 526

In the Supreme Court of the United States

OCTOBER TERM, 1957

GENERAL OUTDOOR ADVERTISING CO., INC., PETITIONER

v.

THE UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Claims

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the United States Court of Claims (Pet. 2a-8a) is reported at 149 F. Supp. 163.

JURISDICTION

The judgment of the United States Court of Claims was entered on March 6, 1957. (R. 37.) A timely petition for rehearing was denied on May 8, 1957. (R. 81.) By order of the Chief Justice, on July 13, 1957, the time for filing a petition for a writ of certiorari was extended to and including October 5, 1957. (Pet. 9a.) The petition was filed on October 3, 1957. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1255.

QUESTIONS PRESENTED

1. Whether the Court of Claims erred in holding that two so-called amended claims for refund were not in fact amendments of the original claim, but injected new issues, so that the statute of limitations in Section 322(b) of the Internal Revenue Code of 1939 prevents recovery on those claims of amounts paid more than two years prior to their filing.

2. Whether, in determining the value of a number of companies acquired by taxpayer in 1925, the Commissioner erred in applying the formula of A.R.M. 34 to the aggregate earnings of all the companies to determine the value of the good will acquired.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 322. REFUNDS AND CREDITS.

* * * * *

(b) *Limitation on Allowance.*—

(1) *Period of Limitation.*—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

* * * * *

(26 U.S.C. 1952 ed., Sec. 322.)

SEC. 718 [as added by Sec. 201 of the Second Revenue Act of 1940, c. 757, 54 Stat. 974]. EQUITY INVESTED CAPITAL.

(a) *Definition.*—The equity invested capital for any day of any taxable year shall be determined as of the beginning of such day and shall be the sum of the following amounts, reduced as provided in subsection (b)—

(1) *Money paid in.*—Money previously paid in for stock, or as paid-in surplus, or as a contribution to capital;

(2) *Property paid in.*—Property (other than money) previously paid in (regardless of the time paid in) for stock, or as paid-in surplus, or as a contribution to capital. Such property shall be included in an amount equal to its basis (unadjusted) for determining loss upon sale or exchange.

* * *

* * * *

(26 U.S.C. 1952 ed., Sec. 718.)

STATEMENT

This case involves taxpayer's excess profits tax for the years 1944 and 1945. The controversy over the amount of its excess profits credit, computed upon the basis of its invested capital, relates to the valuation of two items included in its invested capital, good will and land and buildings. The facts may be summarized as follows:

Taxpayer, a corporation engaged in the business of outdoor advertising, was formed in 1925, at that time acquiring two groups of companies known as the Thomas Cusack Company and the Fulton Group.

(R. 28.) The transaction took the form of an acquisition of the stock of these companies rather than of their assets. The valuation to be placed on the stock, as part of the invested capital of taxpayer, is the value of the underlying assets of the various companies. (Pet. 4.)

The amount of stock issued by taxpayer in exchange for the stock of the predecessor companies resulted from continuous negotiations between the parties. (R. 28.) Following the acquisition, taxpayer did not on its balance sheets for the years 1925 through 1945 set up good will as an asset on its books (R. 29), and there is no evidence as to the existence of good will except the relationship of earnings and capital of the constituent companies for the period of approximately five years prior to the merger (R. 33).

In determining taxpayer's equity invested capital at the end of 1939, the Commissioner gave consideration to the factor of good will (R. 31), using, in the absence of other evidence, one of the formulas set out in A.R.M. 34, 2 Cum. Bull. 31 (1920). (Pet. 10a-13a.) That formula allows out of the average earnings of a company over a period, preferably not less than five years, a return of 10 per cent upon the average tangible assets for the period. It treats the surplus earnings as a return on the value of the intangible assets, and values those assets at five times the average surplus earnings. (Pet. 12a.)

The Commissioner applied this formula to those companies whose earnings were in excess of 10 per cent of their average capital, reaching a total of

$3,217,700. He also used a similar formula in the case of the companies earning less than 10 per cent, reaching a so-called minus good will for them of $2,260,300, producing a net good will of $957,400 (R. 32-33.)

In the Court of Claims, taxpayer argued that expert testimony showed the good will to have been worth $5,000,000 (R. 55-58), and that in any event the formula of A.R.M. 34 is applicable only to those companies having earnings of more than 10 per cent and is inapplicable to the other companies acquired (R. 54). The Commissioner argued that it had not been shown by the evidence that any good will had been acquired, but that in any event the amount was no greater than that determined by him. (Pet. 4a.)

The court held that good will had been acquired, but that the computation made by the Commissioner more nearly approximates its actual value than the amount computed by taxpayer's witnesses. (Pet. 6a-7a.) It also sustained the Commissioner's application of the formula of A.R.M. 34 to all of the companies acquired, pointing out that the effect of what was done was to take the aggregate value of all the tangible assets of the companies acquired, to compare that aggregate with the aggregate income, and to capitalize the excess over 10 per cent. (Pet. 6a.) It held that in dealing with such an "intangible, illusory, sometimes an ephemeral thing" as good will, where only "some fair approximation" can be reached (Pet. 5a), the method used was "just and fair under all the circumstances" (Pet. 6a).

In determining the amount of taxpayer's equity invested capital the Commissioner decreased the value of land and buildings as set up on taxpayer's books. (R. 35-36.) In its original claims for refund filed on July 29, 1949, taxpayer claimed an increase in the amount of its invested capital based solely on its disagreement with the Commissioner as to the value of the good will and an item of $1,662,808.50 for common stock issued for services in the organization of the company in 1925.[1] It made no claim based on the value of the land and buildings. (R. 33.)

Thereafter, on April 3 and 14, 1950, it filed additional claims for refund, which repeated the claims based on good will, and also asserted as a further ground that the Commissioner had erred in reducing the value of the land and buildings. (R. 34-35.)

The Commissioner did not contest the finding of the Court of Claims' Trial Commissioner that the reduction in value of land and buildings was erroneous. (Pet. 7a, R. 36.) The Court of Claims agreed with the Commissioner, however, that the claims based on under-valuation of land and buildings were not an amendment of the original claim for refund but injected new issues. Accordingly, it held that they were effective only as to payments made two years or less prior to their filing. (Pet. 7a-8a.)

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[1] This latter ground is not at issue in this proceeding.

ARGUMENT

1. Whether a so-called amendment of a refund claim is in fact merely an amendment or is a new claim, introducing new issues, is a question depending upon the circumstances of the particular claim. This Court in *United States* v. *Andrews*, 302 U. S. 517, and *United States* v. *Garbutt Oil Co.*, 302 U. S. 528, 531, established the principle that if the original claim is general in nature an amendment may make it more specific, but that if the original claim is directed to a specific item a later claim directed to a different item is not an amendment. The present case clearly falls within that rule, since the first claims specifically dealt with the item of good will and the later claims raised a new issue, the value of the land and buildings.

Taxpayer, relying on *Pink* v. *United States*, 105 F. 2d 183 (C. A. 2d), argues that amendment should be permitted in any case in which the facts on which the amendment is based would necessarily have been ascertained by the Commissioner in determining the merits of the original claim. It also states that a report of the Internal Revenue engineer, dated March 3, 1950, made during the Commissioner's examination of the original claim, did necessarily ascertain the value of the land and the buildings.

The report, however (R. 33-34), did not require any ascertainment of the value of the land and the buildings. It noted that physical assets were taken on taxpayer's books at appraised values higher than the book values at which they had been carried on

the books of the predecessor constituent corporations. It noted that good will of the constituent corporations had been computed using the lower values shown on their books, and that if the assets were to be restated at the higher values, that would involve a corresponding reassessment, downward, of the value of the good will. The report then discusses other reasons why the claim for an increased value for good will over the $957,400 allowed by the Commissioner should be denied.

Even under the language of *Pink* v. *United States*, *supra*, it is apparent that the court below could reasonably conclude that in this report the engineer did not ascertain the value of the land and buildings as a necessary part of his recommendation as to the merits of the original claim.

Nor does the Court of Claims disagree with the *Pink* case. In its decisions, cited by taxpayer in its petition (p. 10), the Court of Claims has set out the rules to be followed in language similar to that used in the *Pink* case. Taxpayer is merely disagreeing with the Court of Claims in its application of these rules to the particular facts here involved. This disagreement, based upon varying interpretations to be placed upon a few sentences of the engineer's report, raises no legal question of general importance calling for review by this Court.

2. Taxpayer, while accepting the applicability of a formula based on A.R.M. 34, 2 Cum. Bull. 31 (1920), in determining the value of a portion of the assets transferred to it, objects to the application of the same principle to the rest of the assets. It argues

that when a group or groups of corporations have been acquired by another corporation, even in a single transaction, Section 718(a)(2) of the Internal Revenue Code of 1939, *supra*, p. 3, requires that each constituent company be valued separately, regardless of their aggregate value, as part of taxpayer's invested capital.

The effect of taxpayer's contention would be to overvalue the good will of the aggregate of the business acquired by taxpayer. Application of the formula of A.R.M. 34, which taxpayer accepts as a reasonable formula when it works to taxpayer's benefit, does not require a valuation of a group of intangible assets at an amount greater than their aggregate value in taxpayer's hands. The language of the statute certainly does not compel such a result and taxpayer does not cite any decision or legislative history in support of its construction. The court below correctly held that the Commissioner's method was "just and fair under all the circumstances." (Pet. 6a.)

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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